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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5705

OTIS TRAMMEL, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE.

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The Michigan Bar Association Standing Committee on Civil Procedure respectfully moves for leave to file the attached brief *Amicus Curiae* in this case. The consent of the attorneys for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of the Michigan Bar Civil Procedure Committee in this case arises in the natural course of its work. The Michigan Bar Association does not have a Committee on Evidence, and questions of Evidence and Privilege are dealt with by several committees. Questions of Evidence and Privilege being a part of the general field of Procedure are very often referred to this

Committee by the Bar Association or the State Supreme Court, for study, debate, comment, suggested improvement, and recommendations. The Committee has existed continuously as a functioning organ of the Michigan Bar Association for many years. Twenty members from all corners of our large state meet at the State Bar Association headquarters at Lansing regularly and there deliberate and approve, amend, or reject the detailed work of members on the extensive calendar of business. Members who may accumulate more than a few unexcused absences are removed and replaced. The rate of attendance is very high, and the work strenuous and detailed. The membership includes several judges, and several law professors, the balance being active lawyers from every size community and type of practice.

Since the rules of evidence and privilege generally apply in civil, criminal, and quasi-criminal cases with few distinctions, the committee deals in the evidence and privilege areas with whole rules and problems rather than attempting an artificial limitation of our work to civil aspects only, since that limitation is not present in the body of the law of evidence generally.

The opinion of the 10th Circuit Court of Appeals in this case came to the attention of the Committee from the standard reporter in the course of routine research. It raised immediate, grave concern with members because of the destruction of the major part of the existing Federal law of Husband/Wife privilege, and further, because of the fact that if the reasoning of the opinion below were to be accepted as the law of the land, it would be equally valid to emasculate the other major privileges of clergyman-parishioner, attorney-client, and physician-patient.

The Committee then discussed the problem at a meeting and voted without dissent to authorize the undersigned to prepare and attempt to file an *Amicus Curiae* brief in this court. The authority of the Committee to submit this brief as an action of the Committee has been cleared by the Committee Chairman with the President of the Michigan Bar and the staff of the Bar Association.

The concern of our Committee and Bar are not speculative, academic, illusory, or diletantist. The evidentiary privileges are bred in the bone of the working lawyer's daily practice. The decision in this case, by this Court, will instantly set the rule for every Federal trial in our state. More than that, where this Court leads, in the modern era, in the field of evidence, state courts and state codes of evidence increasingly follow. The pressure and impetus to this, and to have naturally uniform rules of evidence has been gaining momentum every since the Federal Rules of Evidence were adopted in 1975. Already over a quarter of the states have adopted these same rules. See *Weinstein's Evidence*, Vol. 1, supplement at T-1 and further supplements thereto. Michigan is now among these states. *Weinstein, supra;* M. R. E. 101 *et seq.* (1978). Michigan provides in its state courts a strong and careful spousal privilege by a well tried statute, M. S. A. 600.2162 (1963), but the security of this and other privileges would be cast in doubt by the opinion below if upheld here. The opinion below says that the marital privilege seen in *Hawkins* v. *United States*, 358 U. S. 74 (1958), still exists but that it can be penetrated for myriad reasons under the new Federal Rule of Evidence 501. Michigan has adopted a close version of 501, and if a privilege anchored in the unanimous prior recent opinion of the United States Supreme Court in *Hawkins* v. *United States, supra,* is not proof against the unsuspected power of rule 501 interpretation, we can scarcely feel more secure about our privilege anchored in a statute of the same period, for it was the clear expressed intent in adopting our new rules of evidence to pattern upon and follow the new Federal Rules and authority. *See* J. Robinson and J. Reed, A REVIEW OF THE PROPOSED MICHIGAN RULES OF EVIDENCE, 56 Mich. St. Bar Journal 21 at 23, 28 (1977). The reflected effect of this Court's decision under the new rules is strongly felt even in those states where adoption is not immediately expected. See 1, *Weinstein's Evidence* at T-2.

While excellent briefs were filed by the parties in the Court below, and are expected here, the opinion below seems unaware of important aspects of the question presented. Among these are the legislative history of the Federal Rules of Evidence concerning privilege, the difficult Constitutional implications of their holding, and an important recent Federal Statute having a bearing on the case. 89 Stat. 806, 28 U. S. C. A. § 2076 (Supp. 1979). It seemed important these be called to the Court's attention and their bearing on the decision analyzed. They could well be dispositive of the case. This is done in the attached brief. Surely this is proper work for an *Amicus Curiae*. We ask only to be permitted to cast what light we can upon the full issues presented by this case.

Wherefore, movant asks leave as aforesaid.

Respectfully submitted,

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BRIEF FOR THE AMICUS CURIAE MICHIGAN BAR ASSOCIATION STANDING COMMITTEE ON CIVIL PROCEDURE.

OPINION BELOW.

The opinion of the Court of Appeals is reported at 583 F. 2d 1166. There was no reported opinion at the District Court level.

JURISDICTION.

Jurisdiction of this Court was invoked by Petitioner under 28 U. S. C. § 1254(1) and Rule 19 of Rules of the Supreme Court of the United States and on February 26, 1979, this Court granted certiorari.

QUESTION PRESENTED.

The Petition for Writ of Certiorari presented the question:

"Is it reversible error to permit a wife to testify against her husband over his objection and without his consent?"

STATEMENT.

The Petitioner was convicted of unlawfully importing heroin and conspiracy to unlawfully import heroin. The government's case against Petitioner was based on the testimony of his wife. The government granted use immunity to the wife in the usual manner. The petitioner made timely, repeated, adequate objection to the use of his wife as a witness against him, and her testimony, as a violation of marital privilege. On appeal the 10th Circuit held in the opinion below that *Hawkins* v. *United States*, 358 U. S. 74 (1958) was not controlling and that the Petitioner was not entitled to the marital testimonial privilege. Petitioner sought certiorari in this Court, which was granted.

SUMMARY OF ARGUMENT.

I. The Opinion below holds that the privilege of a defendant on trial for crime not to have his spouse pitted against him as a government witness, unanimously reaffirmed by this Court in *Hawkins* v. *United States*, 358 U. S. 74 (1958), cannot be claimed by the defendant in this case for six reasons. The asserted reasons are:

A. The witness wife was an "unindicted co-conspirator" here, and not in *Hawkins*. This distinction is without substance because:

1. The record and opinions in *Hawkins* are silent on this point;
2. The label or status had no significance in *Hawkins;*
3. The status of unindicted co-conspirator is amorphous and insignificant in the law for any purpose relevant here;
4. This distinction would combine temptation, opportunity, and unreviewable discretion over defendant's evidentiary rights in the prosecutor to an unpermissable degree.

B. The next reason advanced in the opinion below for thrusting aside *Hawkins* as not controlling is that the witness wife was "subject to prosecution" in this case. This distinction is insupportable because:

1. Such a fact has never been considered a reason for denying a defendant's privilege, and
2. The facts show the claimed difference in *Hawkins* and this case does not exist.

C. The third reason advanced in the opinion below to cast away the *Hawkins* rule was that the new Federal

Rules of Evidence authorize and permit the departure. This reason is invalid, because:

1. The "light of reason and experience" support *Hawkins;*
2. The legislative history of the Federal Rules of Evidence show the clear intent to preserve the privilege;
3. An important recent statute of Congress displays the intent to protect existing privilege.

D. The opinion below states that the defendant husband lost his privilege in this case because the witness wife was given immunity. This reason is irrelevant, because:

1. Past cases do not support this new theory, but are inconsistent with it;
2. Neither Congress or this Court ever intended such a collateral effect for the immunity statute, which is concerned with the Vth Amendment rights of the witness and not the rights of others; and
3. The rationale unwisely imperils other existing privileges.

E. Next, the opinion below finds the privilege not applicable here because they say the marriage of the witness and the defendant was worthless. This reason to depart from *Hawkins* will not do, because:

1. The purported distinctions are illusory, standardless, and confusing;
2. The past cases strongly reject such unwise judicial enquiry on quality of marriage;
3. There was not even a factual enquiry on this point in this case.

F. The final reason the opinion below gives for breaking through the *Hawkins* privilege is that the end justifies

the means, that is, the defendant is bad and thus is entitled to fewer rights than good persons. This is not sound law, but a dangerous breach of uniform standards.

II. The Constitutional Implications of upholding the reasoning of the opinion below would be pervasive and severe. While these implications are not considered, explored or developed in the opinion below, they are real and important. The opinion below impairs a deep natural right of privacy rooted in the Ist, IVth, Vth, and IXth Amendments. Though these rights were overlooked in this case, they will rise to be litigated in many cases and aspects if the reasoning of the opinion below becomes the law of the land.

III. Conclusion. For all the above reasons the *Hawkins* anti-spouse pitting privilege should be re-affirmed and held fully applicable to the facts here.

ARGUMENT.[1]

I.

THE OPINION BELOW HOLDS THAT THE PRIVILEGE OF A DEFENDANT ON TRIAL FOR CRIME NOT TO HAVE HIS SPOUSE PITTED AGAINST HIM AS A GOVERNMENT WITNESS, CANNOT BE CLAIMED BY THE DEFENDANT IN THIS CASE FOR SIX REASONS. THESE REASONS ARE SEVERALLY ERRONEOUS.

Your *Amicus* respectfully suggests that the opinion of the Court of Appeals in this case is in error. The argument of that opinion is that while *Hawkins* v. *United States,* 358 U. S. 74 (1958) is the law, it was proper not to follow *Hawkins* in the present case for a composite of six reasons. These reasons are:

1. The wife was an unindicted co-conspirator here. 583 F. 2d 1166, 1168.
2. The wife was subject to prosecution here. 583 F. 2d 1166, 1168.
3. The Federal Rules of Evidence permit and sanction this departure. 583 F.2d 1166, 1170.
4. The wife was given immunity in this case. 583 F. 2d 1166, 1168-1170.
5. The marriage here was worthless. 583 F. 2d 1166, 1170-1171.
6. The end justifies the means. 583 F. 2d 1166, 1171.

Each of these caimed distinctions or reasons for departing from *Hawkins* in this case is severally erroneous. The attempt to

1. Your Amicus and its Attorney of Record wish to gratefully acknowledge in this brief the substantial and valuable assistance of Robert L. Love, Jr. of Seattle, Washington, Kathleen H. Moriarty of New York, New York, and Eugene J. Brady of Sturgis, Michigan, law students at the University of Notre Dame Law School, in the preparation of this brief.

weave six errors into a new rule of law destroying an ancient and important rule of law is remarkable from many points of view and undesirable from even more. The singular nature of the process of legal reasoning applied is a good measure of the desperate violence of what is here attempted. One may be sure that sounder and more normal modes of legal argument would have been employed if they would have supported the result desired to be achieved by the majority opinion below, namely, the extinguishment of the more ancient and vital of the two forms of marital privilege, and the practical overruling of *Hawkins.*

This *Amicus* brief will discuss each of the six claimed reasons why *Hawkins* was supposed somehow to be different from the present case, and show that these claimed distinctions are all either inaccurate, inadequate, irrelevant, or highly destructive to the rule of law. Some of the claimed reasons present more than one of these fatal blemishes.

A. The Witness Wife Was an "Unindicted Co-conspirator" Here, and Not in Hawkins. This Distinction Is Without Substance Because:

1. The Record and Opinions in Hawkins Are Silent on This Point.

The first reason advanced for deciding this case by the opposite of the basic rule reaffirmed in *Hawkins* is that here, the wife was an unindicted co-conspirator, which she was not in *Hawkins.* In the first place, so far as the published opinions in *Hawkins* go, this is merely a brash assumption from a silent record in a case where neither the Court of Appeals, who denied the privilege, or this Court, who upheld the ancient privilege and reversed the Court of Appeals, discussed this point. Plainly neither court considered it of the slightest significance to the question presented. Now, from the silence of those opinions, is to be conjured a "fact", and that imagined fact made so im-

portant as to take prominent place among reasons to distinguish away the last opinion of this Court, which was unanimous in support of the privilege.

The opinion below falls into error here by failing to recall that a witness may be an unindicted co-conspirator for every purpose known to this time to the rules of evidence without being labelled such in the indictment. Indeed, this is the commonest way in which such witnesses appear in the cases. *See* for example, *United States* v. *Pugliese,* 153 F. 2d 497, 500 (C. A. 2, 1945), L. Hand, J., G. Lilly, *An Introduction to the Law of Evidence,* 205 (1978); McCormick, *Evidence,* § 267 at p. 646 (1972); and Federal Rules of Evidence, Rule 801(d)(2)(E), especially comment of Advisory Committee and Senate Judiciary Committee on the Rule. All of these authorities agree that the indictment does not even have to *charge* conspiracy, let alone label the witness, in order for the status to be achieved and the rule applied. If the government is serious in contending this labelling has an important effect on the evidentiary rights of defendant, then they should in logical fairness refuse to apply the co-conspirator exception to the hearsay rule unless the out of court declarant has been named an unindicted co-conspirator in the indictment. It is safe to assume the prosecution will not adopt that view, nor does your *amicus* urge it.

2. The Label or Status Had No Significance in Hawkins.

The position, then, is this. Either the wife in *Hawkins was* an unindicted co-conspirator or she *was not*. We cannot tell from the opinions, for they are silent. If she *was,* then the supposed distinction does not exist. If she was not, then neither Court in *Hawkins* found that significant enough to even mention, which is a strange way to handle what is now claimed to be a vital difference. In *Hawkins,* the Court of Appeals simply relied on their own earlier opinion in *Yoder* v. *United States,* 80 F. 2d 665 (C. A. 10, 1935). *Yoder* in its turn did not involve a co-conspirator wife, and in no way suggests that this would be

important. In fact, if it had been deemed important in *Yoder,* the court could not have reached the decision it did, for Mrs. Yoder was but an innocent, uninvolved bystander.

In *Hawkins,* the Court of Appeals had said:

> ". . . But in *Yoder* v. *United States,* 10 Cir., 80 F. 2d 665, this court committed itself to the view that a wife is a competent witness to give testimony against her husband *on the trial of a criminal case in which he is charged with a crime.* . . . the court expressly placed its decision upon the underlying ground that a wife is a competent witness for the government in a criminal case *in which her husband is being tried for a criminal offense;* and we are content to follow that case without any effort to amplify or elucidate its undergirding philospohy." *Hawkins* v. *United States,* 249 F. 2d 735, 736 (C. A. 10, 1957) (emphasis added).

It is disingenuous to argue now that if Mrs. Hawkins had been labelled an "unindicted co-conspirator" (as she easily could have been so classified[2]) *that* would have made an important difference. The Court of Appeals in *Hawkins* made no such distinction and instead grounded their position on their own earlier, unreviewable opinion in *Yoder,* a case in which the wife was an innocent outsider not guilty or claimed to be guilty of *any* crime or conspiracy. Further, there was not even a charge of conspiracy in *Yoder! See Yoder* v. *United States,* 80 F. 2d 665, 667 (C. A. 10, 1935); *see also* the same case at earlier trial, *Yoder* v. *United States,* 71 F. 2d 85 (C. A. 10, 1934).

3. The Status of Unindicted Co-conspirator Is Amorphous and Insignificant in the Law for Any Purpose Relevant Here.

It is also appropriate to examine the designation or label "unindicted co-conspirator" to see what kind of horse is being asked to bear the weight or part of the weight of an exception

2. *See* the facts of *Hawkins* in 249 F. 2d 735, 737, and note, she had been imprisoned as a material witness and put under a bond of $3,000 to appear for the government. *See* 358 U. S. 74, 82-83.

sufficient to destroy *Hawkins* and the ancient privilege. Now, if this were a status which was so important it could destroy the personal legal rights of others, we would expect it to have been clearly defined by statute, rule, or court decision.

Instead, no federal statute, regulation, or rule defines it. As to Judicial definition, Words and Phrases covering from 1658 to date, did not even contain this category until the current pocket part, which contains two cases. One was the special, limited, delicate case of Mr. Nixon, where this Court declined to review and disturb the Grand Jury's designation of Mr. Nixon as an unindicted co-conspirator, noting the familiar rule that declarations of a co-conspirator in furtherance of the conspiracy are an exception to hearsay rule. This Court did not, even in those careful circumstances, think it necessary to define what an unindicted co-conspirator is. The other case is a federal court decision holding that the designation is so piffling that it need not be disclosed even under the rigorous requirements of the S. E. C. *See* 43 *Words and Phrases* "Unindicted Co-conspirator" (Supp. 1978 at p. 35), citing *United States* v. *Nixon,* 418 U. S. 683, 687, 700, 701 (1974) and *Lyman* v. *Standard Brands Inc.,* 364 F. Supp. 794, 798 (E. D. Pa. 1973).

The *Lyman* case, *supra,* is the one prior judicial decision that does concern itself with the meaning and status of "unindicted co-conspirator." That case held that the role of unindicted co-conspirator is not even important enought for its omission to be material under the scrupulously exact rules of the S. E. C. as to proxy statements for publicly traded companies. The court then said:

> "The naming of Andersen as an unindicted co-conspirator is of no significance for the purpose of § 14(a). Whatever the outcome of the Four Seasons litigation, the government has no obligation to prove anything against Andersen and there will be no determination of Andersen's guilt or innocence since it is not charged with committing any unlawful acts. The naming of a party as an unindicted co-conspirator is often more a means of taking advantage of the rules of evidence in conspiracy prosecutions than it is an intimation of guilt. See Note, "Developments in the Law: Criminal Conspiracy," 72 Harv. L. Rev. 920, 983-88 (1959). To inform the shareholders of Andersen's role in the Four Seasons indictments would convey no information relevant to their vote on the proposal before them (that Andersen be made auditor of their company) and would probably serve only to confuse." *Lyman* v. *Standard Brands Inc.,* 364 F. Supp. 794, 798 (E. D. Pa. 1973) (explanatory insert in parenthesis added).

The whole category of co-conspirator has been significant in law only for three purposes. First, you cannot have a conspiracy without co-conspirators, for no one, not even a schizophrene, can conspire with himself alone. 15A C. J. S. *Conspiracy,* § 37 at p. 730 (1967), and many cases collected there at n. 16. *See also,* 16 Am. Jur. 2d *Conspiracy,* § 19 at p. 137 (1964). Second, a conspiracy is a partnership or agency for a criminal purpose, so naturally, what one partner or agent says in furtherance of an existing conspiracy is provable against other partners in the enterprise as an exception to the hearsay rule, if there is other adequate evidence that the conspiracy existed and the declarant was part of it. *See* G. Lilly, *An Introduction to the Law of Evidence,* 204, 205, 374-376 (1978). This exception to the hearsay rule is doubtful and confused enough in its own field, hearsay, and the Constitutional limits on its use, without trying to forge its imperfect metal into a weapon to destroy the marital privilege. *See* Davenport, *The Confrontation Clause and the Co-Conspirator Exception In Criminal Prosecutions: A Functional Analysis,* 85 Harv. L. Rev. 1378 (1972). There the author sounds a warning that nearly every writer on conspiracy has echoed:

> "Because of its evidentiary benefits, the co-conspirator exception has long played a major role in criminal trials. Its invocation in practice will often allow evidence otherwise considered unreliable to come before the jury, with the consequent danger that the verdict will be unduly affected not only as to any alleged conspiracy, but also as to any alleged choate crimes. And the threat of its invoca-

tion may operate either as a discouragement to otherwise legitimate activities, especially in the first amendment area, or as a tool of prosecutorial harrassment. The temptation for prosecutors to add a frivolous conspiracy charge to a defendant's indictment (or simply to allege 'a concerted effort') in order to secure these benefits is likely to be considerable." 85 Harv. L. Rev. 1378, 1383, 1384.

4. This Distinction Would Combine Temptation, Opportunity, and Unreviewable Discretion Over Defendant's Evidentiary Rights in the Prosecutor to an Unpermissable Degree.

Though Davenport's remarks are addressed to the dangers of the co-conspirator exception to the hearsay rule, it is clear that the temptations and dangers would be doubled if the government's arguments here were accepted, so that co-conspirator status not only eliminated some hearsay/confrontation protections, but also destroyed the evidentiary privilege of the other defendant. The co-conspirator exception to the hearsay rule is troubling enough in its proper area, without expanding its sway to another unrelated field involving independently important rules and policies. As Davenport observes,

> ". . . It is one thing to say that because we hate all conspirators, we will treat conspirators especially harshly. But it quite another to say that because we hate conspirators, we will treat harshly everyone *accused* of conspiracy." 85 Harv. L. Rev. 1378, 1391.

Yet if conspiracy is the essential key to breaking a privilege that would otherwise obtain, that is exactly what we are doing.

Third, an indictment must be specific enough as to co-conspirators to provide protection under the double jeopardy clause. The specific designation of unindicted co-conspirators in the indictment is so void of real meaning that an indictment may be quite adequate without naming them or all of them. *United States* v. *Gasoline Retailers Association, Inc.*, 285 F. 2d 688, 691, 692 (C. A. 7, 1961); *United States* v. *Williams*, 309 F. Supp. 32, 36 (N. D. Ga. 1969). If they or some of them are needed to

understand the charge or perfect the shield of double jeopardy, a bill of particulars will be granted. *United States* v. *Fine*, 413 F. Supp. 740, 745 (W. D. Wis. 1976); 15A C. J. S. *Conspiracy* § 82 at pp. 847, 848 (1967).

In all of Am. Jur. 2d, there are 65 detailed sections plus 15 pages of pocket part on the law of conspiracy, yet there is not a single mention of this novel doctrine—that co-conspirator status operates to destroy another accused's privileges—in that work. *See* 16 Am. Jur. 2d *Conspiracy* (1964 & Supp. 1978) generally.

In C. J. S. there are 96 sections covering 391 pages, plus 34 pages of detailed index and 42 unnumbered pages of pocket part through 1978, collecting the whole body of American Law on conspiracy. Yet this new doctrine contended for by the government finds no lodgement or suggestion there. *See* 15A C. J. S. *Conspiracy* (1967 & Supp. 1978) generally.

A pedigree so strange and slender should be rightly viewed with grave suspicion.

If naming a witness as a co-conspirator can destroy a defendant's priviege, consider how widely the net this Court is asked to spread stretches. The general conspiracy statute of the United States[3] covers any offense against the government or its agencies or any plan to defraud them. That statute (and there are others, some more severe, omitted for brevity's sake) gives the right to file a conspiracy count for nearly all federal crimes. *See*, to this effect, 15A C. J. S. *Conspiracy* § 48 at pp. 768-775 (1957)

3. § 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." 62 Stat. 701, 18 U. S. C. § 371 (1976).

and the array of cases covering the whole criminal spectrum collected there. Indeed, this one statute now drags in its wake 494 pages of tightly packed specific case annotations (18 U. S. C. A. § 371, pp. 3-498) not counting a further 171 pages (pocket part) added in the last 13 years. 62 Stat. 701, 18 U. S. C. A. § 371 (1966 and Supp. 1978). This is but natural when we consider that few serious crimes beyond simple acts of relatively mindless violence are ever done without planning and cooperation, which are the meat of conspiracy. Nearly every serious crime offers the prosecutor the legitimate option of adding a conspiracy count. It already gives him the tactical advantage of breaking through important parts of the hearsay rule and the bar of *res inter alios acta, alios nec prodest nec nocet (See* 54 C. J. *Res Inter Alios Acta, Alios Nec Prodest Nec Nocet* at p. 719 (1931); 16 C. J. *Criminal Law* § 1113 (1918); 22 C. J. *Evidence* §§ 832, 833 (1920); 32 C. J. S. *Evidence* §§ 576, 577 (1964); and 22A C. J. S. *Criminal Law* § 602 (1961). Should we add to this the temptation that it is also a device to destroy the fundamental evidentiary privileges of the accused? Indeed, if the government's reasoning is sound, there is no valid reason to limit the effect of co-conspirator status to the marital privilege here assailed. Surely any otherwise valid privilege has no higher claim.

In 1925 Judge Learned Hand observed that the then limited temptation of the situation, had made conspiracy ". . . darling of the modern prosecutor's nursery." *Harrison* v. *United States,* 7 F. 2d 259, 263 (C. A. 2, 1925). The powerful further advantages this new rule offers the prosecutor would change conspiracy from the darling of the nursery to the Queen of battles in the courtroom. The Court will recall that in some federal conspiracy prosecutions (as at common law and in several states) there is no need for the government to prove any overt act to accomplish the crime. *See,* for example, *United States* v. *Dreyer,* 533 F. 2d 112, 117 (C. A. 3, 1976).

It is also well to remember that this support or reason for the proposed new dispensation from the rules does not even require the addition of a conspiracy count or charge, easy as that is. It requires even less, just that the defendant's spouse be named as "an unindicted co-conpsirator" in the indictment. The fact and dynamics of the situation are that the prosecuting attorney prepares and draws the indictment for a generally docile and dominated Grand Jury. *See* 2. M. Ploscowe, *Manual for Prosecuting Attorneys,* 350 n.4, 392 (Practising Law Institute 1956). The fact is, in nearly ever case the U. S. Attorney draws up the indictment and the Grand Jury agree—whatever its technical aspects, such as labelling prospective witnesses as "unindicted co-conspirators" or whatever. *See* M. Lightfoot, *Federal Criminal Practice Manual* 30-31 (Calif. Public Defenders Assn. 1974).

Indeed, this could scarcely be otherwise, for the lay members of the Grand Jury need the abilities of a skilled lawyer to enable them to return well drafted indictments adequate to protect the legitimate interests of both the government and the defendant. No criticism or evil imputation is intended against this necessary practice. The point being made is that the decision to label a witness as an "unindicted co-conspirator" is for practical purposes solely that of the prosecutor who must try for conviction. It is in no real sense filtered by the Grand Jury. There is no effective appeal or review. All this is not too grave so long as the designation remains in the piffling sphere it properly occupies. But to make it the excuse for denying the defendant an evidentiary privilege he would otherwise be protected by, as the opinion below would do, is to grant every U. S. Attorney the right to unilaterally, unreviewably repeal the defendant's law of privilege in a case by simply labelling a witness. This is unacceptable to the rule of law in a democracy, however lofty and devoted the corps of prosecutors may be. It is similar in spirit to the "unreasoned distinctions" in increasing re-trial sentences condemned as inadequate to due process in *North*

Carolina v. *Pearce*, 395 U. S. 711, 723-726 (1969), and redolent of the unbridled exercise of arbitrary power by lower government officials struck down in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886) as "the essence of slavery itself".

For all these reasons, the label "unindicted co-conspirator" is quicksand upon which to lay all or part of the foundation of a new rule of evidence destroying a vital privilege.

B. The Next Reason Advanced in the Opinion Below for Thrusting Aside Hawkins as Not Controlling Is That the Witness Wife Was "Subject to Prosecution" in This Case. This Distinction Is Insupportable Because:

1. Such a Fact Has Never Been Considered a Reason for Denying a Defendant's Privilege.

The next reason advanced to distinguish *Hawkins* is that the wife in this case was subject to prosecution.

The first response to this is that the distinction raised has no legal significance except to point up the weakness of the evidence. It is nothing more than the "unindicted co-conspirator" argument in a new frock, and that argument has been sufficiently dealt with above. Indeed, the usual response of the law to the testimony of an accomplice (and the wife is nothing different in this case except for the label) has been to view it with great caution, refuse to sustain a conviction upon it without independent corroboration, and warn juries of its weakness. 23 C. J. S. *Criminal Law* § 808 (1961), and numerous cases there collected; H. Underhill, *Criminal Evidence* § 181 (6th ed. 1973). The government's remarkable position here is that because W was in a situation that casts doubt on her testimony (*See Alford* v. *United States*, 282 U. S. 687 (1931), her testimony gains instead of losing strength so that it can override H's privilege, which it apparently could not if the wife were an innocent bystander.

2. The Facts Show the Claimed Difference in Hawkins and This Case Does Not Exist.

In addition, the attempted distinction or factor of distinction (that Mrs. Hawkins was not subject to prosecution) is simply not borne out by a reading of the facts in the *Hawkins* case. There, we know that Hawkins ran a tavern or dancehall in Dogpatch, Oklahoma, where he recruited a 17 year old local girl, Lola, to work as a prostitute with his wife in Tulsa, Oklahoma. The next day Hawkins drove Lola in his car to Mena, Arkansas and then to Tulsa. On the outskirts of Tulsa, very early in the morning,[4] Hawkins stopped at a gas station and made a phone call. In about a half hour, Jane, Hawkins' prostituted wife, drove up with another prostitute "Tommie" in her car. Jane took Lola to Jane's own room in a local hotel where she and Tommie operated. There they redid Lola's make-up and eyebrows while Jane instructed her as to where and how to ply the trade of prostitution and how much to charge.[5] After several days of work, the Tulsa police closed in, and after "Tommie" paid Lola's fine, Jane and her co-workers moved. Jane drove Tommie and Lola to Ft. Smith, Arkansas, where Hawkins met them. Hawkins then took Lola in his car to Hot Springs, Arkansas, where he spent the night with her. Then Lola had a change of heart and caught a bus home to her mom and dad in Dogpatch. Despite all her work at Tulsa, Lola had only one penny left to her name after she bought her bus ticket back to Dogpatch.[6] During the few days Lola had worked in Tulsa, Jane had sent Hawkins a $150.00 money order. Hawkins claimed on re-direct that this was to repay money Jane had taken from his cash register, and had nothing to do with Lola.[7] If the jury believed that, it was the only part

4. ". . . after midnight, along toward daylight." Transcript of Record in *Hawkins* v. *U. S.* in 10th Cir., lodged with this Court at 20.

5. *Ibid.*, 22, 23.

6. *Ibid.*, 33.

7. *Ibid.*, 77, 78, 79.

of Hawkins' testimony they believed, for he spun a tale of innocence, ignorance, and benevolence, yet they convicted him. The point was naturally not pressed by either side, for the government had no interest in discrediting Jane, their own witness, and Hawkins had no interest in providing further evidence of his guilt.

The Court is earnestly urged to read the briefs of both sides in *Hawkins* and the transcript at the court of appeal level, which have been lodged with this Court, with permission, by your *amicus*, as well as the briefs and record at Supreme Court level in the archives of this Court, to verify that the foregoing is an accurate statement of the material facts of *Hawkins* as fully as your *amicus* can discover them.

To say of this case that it is different from *Hawkins* because the wife was subject to prosecution here is to re-shape the facts of *Hawkins* arbitrarily to reach a conclusion those facts will not support. Jane (Mrs. Hawkins) was subject to prosecution in *Hawkins*. She had been jailed by the government as a material witness and put under a $3000 bond to appear as a government witness. *Hawkins* v. *United States*, 358 U. S. 74, 83 (1958). Consider how similar the fact patterns were in *Baker* v. *United States*, 329 F. 2d 786 (C. A. 10), *cert. denied*, 379 U. S. 853 (1964), and *United States* v. *Price*, 577 F. 2d 1356 (C. A. 9, 1978), where the wife was easily charged and convicted. *Brunner* v. *United States*, 168 F. 2d 281 (C. A. 6, 1948), also dealt with a plain case where the wife had taken an active part in the crime, and was thus prosecutable, but could not properly testify against her defendant husband.

This Honorable Court has seen enough Mann Act[8] cases to properly evaluate the claim that Mrs. Hawkins was not subject to prosecution. Indeed, the real concern in *Hawkins* was whether Jane was under such threatening duress that her testimony was not voluntary. *Hawkins* v. *United States*, 358 U. S. 74, 82, 83 (1958). The natural conclusion to draw from the *Hawkins*

8. Stat. 812, as amended 63 Stat. 96, 18 U. S. C. § 2421 (1976).

records is that all that saved Mrs. Hawkins from prosecution was prosecutorial discretion not to prosecute in exchange for her testimony.

C. The Third Reason Advanced in the Opinion Below to Cast Away the Hawkins Rule Was That the New Federal Rules of Evidence Authorize and Permit the Departure. This Reason Is Invalid, Because:

1. The "Light of Reason and Experience" Supports Hawkins.

The third argument advanced by the court below to justify departing from the *Hawkins* rule is that the Federal Rules of Evidence permit and sanction this departure.

This argument ignores the legislative history of the Federal Rules of Evidence. Proposed Rule 505 of the Rules as originally sent to the Congress would have preserved the privilege against spouse pitting central to this case. This Court's Advisory Committee said:

> "About 30 jurisdictions recognize a privilege of an accused in a criminal case to prevent his or her spouse from testifying. It is believed to represent the one aspect of marital privilege the continuation of which is warranted. In Hawkins v. United States (citations omitted) it was sustained." *Advisory Committee Note, Proposed Federal Rule of Evidence 505*, Federal Rules of Evidence for United States Courts and Magistrate's (West, 1975.)

In the first place this is interesting in light of the argument of the Court below that based on the facts of Trammel's case, in the "light of reason and experience" a change in this very marital privilege is dictated. This is not a new argument. It is based on the language of Rule 26 of the Federal Rules of Criminal Procedure, and it was identically argued by the government in *Hawkins, supra*, and there unanimously rejected.

In his thoughtful concurrence in *Hawkins*, Mr. Justice Stewart said that the data necessary to make an intelligent change "in

the light of reason and experience" could never be provided in a single case. He said, back in 1958, that instead, there ought to be a continuing body to study and recommend uniform rules of evidence for the Federal Courts, as prior Circuit Judicial Conferences had recommended. Few would say now this view and advice were not sound. This Court judicially knows its own role in the important events of a decade later.

The suggested body of experts, the Advisory Committee, was formed. Under the aegis and guidance of this Court they probed deeply and labored hard on a new federal code of evidence. And at the end of all their labors and debates, they commended to this Court and this Court approved and forwarded to Congress a re-affirmation of the *Hawkins* rule in the plainest terms. In other words, the re-examination of the rule in the light of reason and experience was made by the means suggested in the *Hawkins* concurrence as best, and the result was unequivocal approval of the *Hawkins* rule. The Rule 26 theorem cannot justly mean that every Federal Court in the land is to re-assess the value of each of the existing rules of privilege in each case and do what seems to each of them best in each case. Yet the court below seems to be saying nearly that. *Trammel* v. *United States,* 583 F. 2d 1166, 1170 (C. A. 10, 1978). The rules of privilege and the values they guard are too precious to be thrown into that sort of a Waring blender.

2. The Legislative History of the Federal Rules of Evidence Show the Clear Intent to Preserve the Hawkins privilege.

At first glance, there might seem to be some comfort for the government in the action of the Congress upon the Rules. After all, all of the proposed rules of privilege foundered there in favor of a return to the reason and experience standard, now embodied in Rule 501 of the Federal Rules of Evidence. The inference or suggestion that this meant that Congress disapproved the *Hawkins* privilege would be quite wrong, as a detailed examination of the legislative history shows. While nearly all

the proposed privilege rules proved very controversial, the only complaint with the husband/wife privilege rule was that it *narrowed* aspects of the privilege other than the *Hawkins* rule, which federal courts had previously adhered to. *See Moore's Federal Practice Rules Pamphlet, Part 2,* at 503 (1975) and Senate Report there quoted at length.

This was part of the several alterations the proposed rules made in the law of privilege, and these alterations were what blocked the passage of the rules through Congress. *See* S. Rep. No. 93-1277, 93rd Cong., 2d Sess. (1974), *reprinted in* [1974] U. S. Code Cong. & Ad. News 7051, 7052-7053.

Congress was so deeply concerned about the proposed alterations that they held firm to what had been so far clearly decided in this Court, that the rules developed under old Criminal Rule 26 should continue to govern, and that this included a continuing prohibition against one spouse testifying against the other. *Supra,* at 7058, 7059. The case of *United States* v. *Redstone,* 488 F. 2d 300 (C. A. 8, 1973), applies the legislative history of proposed Rule 505 and adopted Rule 501 and reaches the reasoned conclusion that *Hawkins* remains the law of the land. See also, *United States* v. *Panetta,* 436 F. Supp. 114 (E. D. Pa. 1977), *aff'd. mem.,* 568 F. 2d 771 (C. A. 3, 1978).

3. An Important Recent Statute of Congress Displays the Intent to Protect Existing Privilege.

So deep was the disquiet raised in Congress by the possible damage to values protected by the existing laws of privilege that they became concerned with the thrust of the proposed privilege rules as effecting the proper spheres of Court and Congress. S. Rep. No. 93-1277, 93rd Cong., 2d Sess. (1974), *reprinted in* [1974] U. S. Code Cong. & Ad. News, 7051, 7055. Out of that deep concern, Congress spoke clearly:

§ 2076. Rules of evidence

> The Supreme Court of the United States shall have the power to prescribe amendments to the Federal Rules of Evidence. Such amendments shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session of Congress but not later than the first day of May, and until the expiration of one hundred and eighty days after they have been so reported; but if either House of Congress within that time shall by resolution disapprove any amendment so reported it shall not take effect. The effective date of any amendment so reported may be deferred by either House of Congress to a later date or until approved by Act of Congress. Any rule whether proposed or in force may be amended by Act of Congress. Any provision of law in force at the expiration of such time and in conflict with any such amendment not disapproved shall be of no further force or effect after such amendment has taken effect. ***Any such amendment creating, abolishing, or modifying a privilege shall have no force or effect unless it shall be approved by act of Congress.***" 88 Stat. 1948, as amended 89 Stat. 806, 28 U. S. C. A. § 2076 (Supp. 1979) (emphasis added).

It is plain that Congress meant to immunize the existing evidentiary privileges against radical judicial changes through rule making without express, specific Congressional approval. Conf. Rep. No. 93-1597, 93rd Cong., 2d Sess. (1974), *reprinted in* [1974] U. S. Code Cong. & Ad. News 7098, 7107. Although the statute technically covers only the rule making power of the Court, the technician's argument that this leaves open the power to the Court to use the alternative route of a specific, single case decision to mutilate the marital privilege more grossly than anything contemplated in the proposed chapter 500 of rejected rules is not satisfactory. This device would be needlessly confrontative of the Legislative branch, who feel deep, legitimate concerns about Federal Law on the privilege issues and have plainly said so. It could be viewed as an unworthy way to evade the careful procedure Congress intended

to be used in reviewing issues of privilege, and cheating them of their undoubted right to have their say. Much good has come of the grant of rule making power to this Court. Would it be wise to embroil this power in a hornet's nest to grant an inherently unworthy advantage to the prosecution in criminal cases?

The mind of Congress in enacting § 2076 is made plain by the remarks of Rep. Hungate, Chairman of the House Judiciary Subcommittee on Criminal Justice, upon presenting the conference report on H. R. 5463 to the House for final consideration on Dec. 18, 1974. Rule 501 was meant to "leave the Federal law of privilege where we found it." The new rule was not meant, of course, to "freeze" the law of privilege; the power to construe and develop it in light of reason and experience remains. From the context, this meant among other things that the Court was expected to examine the claims to newsmen's privileges, which had been a source of doubt and division in the Congress, and which delicate and important job this Court has since been doing. *See Statement by House Subcommittee Chairman,* 93rd Cong., 2d Sess., 120 Cong. Rec. H 12253 (December 18, 1974), *reprinted in* [1974] U. S. Code Cong. & Ad. News 7108.

But lest this be misunderstood, the Congress adopted together with Rule 501 the statute Pub. L. 93-595, set out above as 28 U. S. C. A. § 2076, and Chairman Hungate stated the reasons for this law:

> "Rules of privilege keep out of litigation relevant and material information. They do so because of a substantive policy judgment that certain values—such as preserving confidential relationships—outweigh the detrimental effect that excluding the information has on the judicial truth-finding process. In short, rules of privilege reflect a substantive policy choice between competing values, and this policy choice is legislative in nature. The legislative character of the policy choice is particularly clear with governmental privileges. Because of the legislative character

of rules of privilege, there is a need for affirmative congressional action in formulating them." *Statement by House Subcommittee Chairman*, 93rd Cong., 2d Sess., 120 Cong. Rec. H 12253 (December 18, 1974), *reprinted in* [1974] U. S. Code Cong. & Ad. News 7108, 7111.

Against the strident cry repeated here as in *Hawkins*, that a single rather tawdry case with an undernourished record represents that "light of reason and experience" which justifies the destruction of the most important part of the marital privilege for all the 220,000,000 people of the United States in all federal cases to come, should be set the sober words of Chairman Hungate in laying down his painfully completed work before his colleagues in the Congress of the United States. His final words were:

> "As I said earlier, this bill is the culmination of over 13 years of work by people in all three branches of Government. The bill is a wholly nonpartisan effort to develop the best possible set of evidence rules to use nationwide in Federal courts. I urge the House to pass this legislation." *Ibid.*, at 7112.

The men who made that massive effort and brought to bear the genuine light of reason and experience on these issues approved of *Hawkins* and meant to keep the *Hawkins* rule. While they did not intend to "freeze" the law of privilege, they enacted at the same stroke as Rule 501, 28 U. S. C. A. § 2076, to show that they did not mean to "melt" it either, or to have the Court melt it without a positive Act of Congress. They meant, as they said, to "leave the Federal law of Privilege where we found it" (*Ibid.*, at 7110) and to stake their claim to the right as elected representatives of the people to participate in changes in that law of the magnitude involved here (*Ibid.*, at 7111). It may be urged that their claim to participate could be expediently evaded in the short run, but this Court has ever shown a proper and decent respect for the functions, spheres, and responsibilities of the coordinate branches. And in the long run, it cannot be

seriously questioned that the Congress have the right and power to legislate independently on the rules of privilege, should they choose.

D. The Opinion Below States That the Defendant Husband Lost His Privilege in This Case Because the Witness Wife Was Given Immunity. This Reason Is Irrelevant, Because:

1. Past Cases Do Not Support This New Theory, But Are Inconsistent With It.

The court below attached great significance to the fact that Mrs. Trammel had been granted immunity from prosecution by the government, in exchange for her testimony. It is clear that this "distinction" from the earlier cases was one of the major underpinnings of the decision:

> "Nothing in *Hawkins* or any other reported decision, to our knowledge, prohibits the voluntary testimony of a spouse who appears as an unindicted co-conspirator under grant of immunity from the government in return for her testimony.
>
> * * * * *
>
> "This case, unlike *Hawkins* and other like cases, involves the wife as a participant in the criminal transaction, subject to prosecution therefor. It matters not, in this context, that the witness granted immunity is the spouse of one of the defendants." 583 F. 2d at 1168.

Even the most cursory reference to *"Hawkins* or any other reported decision," or to *"Hawkins* and other like cases," reveals that the lower court's distinction is illusory, at best.

In *Hawkins*, this court stated that:

> "The government does not here suggest that authority, reason or experience requires us wholly to reject the old rule forbidding one spouse to testify against the other. It does ask that we modify the rule so that while a husband or wife will not be compelled to testify against the other, either will be free to do so voluntarily. Nothing in this Court's

> cases supports such a distinction between compelled and voluntary testimony, and it is emphatically rejected in *Stein* v. *Bowman*, [13 Pet. 209], a leading American statement of the basic principles on which the rule rests. 13 Pet., at 223." 358 U. S. at 77.

Further, as the trial record in *Hawkins* amply demonstrates, the wife was actively engaging in prostitution and in the training of at least one new prostitue who had been transported across state lines by her husband, the defendant on trial for violation of the Mann Act, 62 Stat. 812, as amended 63 Stat. 96, 18 U. S. C. § 2421 (1976).[9]

In *Brunner* v. *United States*, 168 F. 2d 281 (C. A. 6, 1948), a case cited to by this Court in *Hawkins*, 358 U. S. at 75, n. 2, the husband had been convicted of fraudulently obtaining a registered letter addressed to another party. How did he obtain the letter in question? The record is clear:

> "Mrs. Brunner testified that she was the wife of appellant and was willing to testify; that she was at home at 2620 Slevin on December 10, 1946, and remembered the occasion when Nelson [the letter carrier] brought a registered letter to 2622 for Mrs. Pence; . . . that appellant after talking to the carrier came into the house and told her that the mail man was out there and to tell him that she was Mrs. Pence's sister; that she was not Mrs. Pence's sister but she did what appellant told her and brought the letter into the house and put it in her mother's china cabinet . . ." 168 F. 2d at 282.

Mrs. Brunner's culpability in the situation was there, for all to see. Her testimony left no doubt—and its incorrect admission by the trial court left the government with no case, as the Sixth Circuit reversed and remanded the case, with instructions for its dismissal. 168 F. 2d at 284.

Reference to these cases shows that, in the present case, the lower court's "distinction" is, quite simply, insupportable.

9. *See* the earlier discussion of the particular facts in *Hawkins*, *supra* pp. 17-18.

The court below was correct, however, when it observed that:

> "The Congressional intent, then, is that the statutory claim of immunity be as broad as, but no broader than, the privilege against self-incrimination." 583 F. 2d at 1168. (Citations omitted.)

That the purpose of testimonial immunity is to act as a shield for an otherwise criminally liable witness, and not as a sword with which to slay a valid claim of privilege by a defendant, is plain. To state, as the court below did, that "A defendant has no standing to contest the propriety of a grant of immunity to a witness," 583 F. 2d at 1168, is to state a truism which serves to point up the problem, not the answer.

2. Neither Congress or This Court Ever Intended Such a Collateral Effect for the Immunity Statute, Which Is Concerned with the Vth Amendment Rights of the Witness and Not the Rights of Others.

"This statutory immunity is intended to be as broad as, but no broader than, the privilege against self-incrimination." H. Rep. No. 91-1549, 91st Cong., 2d Sess. (1970), *reprinted in* [1970] U. S. Code Cong. & Ad. News 4007, 4017. In *Kastigar* v. *United States*, 406 U. S. 441 (1972), this Court stated that,

> "We conclude that the immunity as provided by 18 USC § 6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it." 406 U. S. at 462.

The grant of immunity works as a substitute only for the witness' Fifth Amendment rights against self-incrimination. Further, it "leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege." The government is contending, however, that this grant of immunity supplants not only the witness' Fifth Amendment rights, but the marital testimonial

privilege for the witness and defendant spouse, as well. This is nothing more than an attempt to merge the legal identities of both spouses into one indivisible unit for purposes of criminal prosecution—a return to the days of Lord Coke, when he stated that,

> *"Note,* it hath been resolved by the justices that a wife cannot be produced either against or for her husband, *'qua sunt duae animae in carne una'; . . .*" Coke, *Littleton,* 6b. (Emphasis in original.)

3. The Rationale Unwisely Imperils Other Existing Privileges.

Further, the reasoning of the government and of the court below forces the conclusion that any future claim of Fifth Amendment rights against self-incrimination shall work to instantly destroy the claimant's and his or her spouse's entitlement to the husband/wife testimonal privilege!

Your *Amicus* respectfully submits that this Court cannot allow such an assault on this privilege to go unrebuffed. For, if it does, which privilege shall next fall to The Grim Reaper of Immunity —Attorney-Client? Physician-Patient? Priest-Penitent?[10]

10. There is a dearth of decisional authority available on the proposition thus raised by the government. Two decisions located, however, reject the contention, if only implicitly: *Farnsworth* v. *Zerbst,* 98 F. 2d 541 (C. A. 5, 1938) holding that existence of diplomatic immunities of co-conspirators have no effect on the status of a defendant; and *United States* v. *Pappadio,* 346 F. 2d 5 (C. A. 2, 1965), *vacated on expiration of grand jury term sub nom. Shillitani* v. *United States,* 384 U. S. 364 (1966), "Since the policies served by the attorney-client privilege go beyond protection against self-incrimination, the privilege is not destroyed by a grant of immunity from prosecution." 346 F. 2d at 9 (citation omitted).

E. Next, the Opinion Below Finds the Privilege Not Applicable Here Because They Say the Marriage of the Witness and the Defendant Was Worthless. This Reason to Depart from Hawkins Will Not Do, Because:

1. **The Purported Distinctions Are Illusory, Standardless, and Confusing;**
2. **The Past Cases Strongly Reject Such Unwise Judicial Inquiry on Quality of Marriage;**
3. **There Was Not Even a Factual Inquiry on This Point in This Case.**

The court below would have this Court adopt the philosophy of the Clown in Shakespeare's *Twelfth Night,* wherein he said:

> "Many a good hanging prevents a bad marriage . . ."[11]

To properly evaluate the lower courts reliance on its conclusion that the Trammels were party to a "bad marriage", 583 F. 2d at 1170-1171, three questions must be asked:

(1) Is this marriage so qualitatively different from those involved in *Hawkins* and the other cases which the lower court chooses not to follow, as to justify such a departure from the settled law?

(2) Even if this marriage is "bad", is such an inquiry proper within the scope of the federal judiciary?

(3) If such an inquiry is proper, then the final question must be asked: Where is the proof for the ultimate conclusion, i.e., the existence of a "bad marriage" unworthy of protection?

In deciding *Hawkins,* this Court came down solidly in support of the "long-standing rule of evidence which bans a husband or wife from testifying against his or her spouse," 358 U. S. at 74, as interpreted and applied by the lower courts in *Paul* v. *United States,* 79 F. 2d 561 (C. A. 3, 1935), *Brunner* v. *United States,*

11. William Shakespeare, *Twelfth Night; or, What You Will,* Act I, Scene V, line 20.

168 F. 2d 281 (C. A. 6, 1948), and *United States* v. *Walker*, 176 F. 2d 564 (C. A. 10), *cert. denied*, 338 U. S. 891 (1949). 358 U. S. at 75, n. 2. Were the marriages in those cases so far superior to the Trammel marriage, as to warrant distinction?

In *Paul*, the husband and wife had lived separate and apart for nearly five years; the husband had alleged that his wife had forged his endorsement to a check, so testifying at trial over his wife's objection. Held by the Third Circuit: "The learned court . . . [below] fell into errror in permitting Norman Castle Reid to testify against his wife . . ." 79 F. 2d at 563.

In *Brunner*, the husband and wife committed "fraud and deception" in obtaining a registered letter addressed to a third party; the wife, after a hearing in chambers, testified over her husband's objection to the full extent and nature of their joint criminal acts. She further testified that her husband had threatened to kill her if she revealed their actions. The Sixth Circuit held *Graves* v. *United States*, 150 U. S. 118 (1893), to be unaffected by the later decision in *Funk* v. *United States*, 290 U. S. 371 (1933), and controlling in the case before them: "[T]he wife was not a competent witness against her husband." 168 F. 2d at 283.

In *Walker*, the husband had been convicted of "transporting from Houston, Texas, to New York City sums of money, 'taken feloniously by fraud and with intent to steal and purloin.' " 176 F. 2d at 565 (footnote omitted). The court described the marriage thusly: after inducing his wife to sell some real estate in order to turn the proceeds over to him, the husband "dispatched her, first to Canada, and later to Alaska, were she lived in destitution until her eyes were at length opened, and at the time of trial she had brought a suit against him for divorce." 176 F. 2d at 565-566. The wife was permitted to testify at trial, over the husband's objection. The Second Circuit reversed and remanded the conviction "because we hold that no part of the testimony of the witness [the wife] was admissible

anyway; and for that reason the judgment cannot stand." 176 F. 2d at 567-568.

In *Hawkins* the government described the marital relationship in the following manner:

> "[I]n the instant case the parties were living apart, further attenuating a conjugal relationship that seems never to have been too substantial.[17]

17. Petitioner inadvertently referred to the witness whose testimony is in question as his 'ex-wife' and stated, in excuse for his lapse, that they had never lived together very much (R. 46). At the time of the acts complained of, she was living apart from him under an assumed name." Government's Brief, *Hawkins* v. *United States*, 358 U. S. 74 (1958) at 28.

Nevertheless, in rejecting the government's contentions this Court stated that,

> ". . . there is still a widespread belief . . . that the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences. Under these circumstances we are unable to subscribe to the idea that an exclusionary rule based on the persistent instincts of several centuries should now be abandoned." 358 U. S. at 79.

Which marriage was a "better" marriage, more worthy of protection? Which was least deserving of recognition? Which fell in between? It is obvious that no rational distinction can be drawn between the subject husband/wife relationships, sufficient to warrant the abandonment of the "persistent instincts of several centuries . . ."

Even if such a distinction could be reasonably established, however, the question still remains: Should the federal judiciary engage in such inquiries, analyses, and judgments?

In *United States* v. *Walker*, 176 F. 2d 564 (C.A. 10), *cert. denied*, 338 U. S. 891 (1949), Chief Judge Learned Hand in speaking for the court, rejected any suggestion of such activities on the part of this nation's judiciary:

> "Nor is it either practicable or desirable to make the decision [of whether or not the subject marriage is deserving of the protection afforded by the privilege] dependent upon the judge's conclusions that in the instance before him the marriage has already been so far wrecked that there is nothing to save. That was true, no doubt, here; but we must look beyond the case before us. The questions will always arise in the progress of the trial; it must be decided at once; and its answer introduce a collateral inquiry likely to complicate the trial seriously. The common-law avoided such an inquiry by taking divorce as the only test; and while the privilege persists at all, there is every reason so to limit the exception." 176 F. 2d at 568.

Twenty years ago, in its Brief to this Court in *Hawkins*, the government was emphatic in its position:

> ". . . reason and experience justify the view that one spouse should not be compelled to testify against the other . . ." Government's Brief, *Hawkins* v. *United States*, 358 U. S. 74 (1958), at p. 7.
>
> "It is the government's position that there is a vast difference between compelling a wife to testify against her husband and permitting her to testify if, of her own volition, she chooses to do so. The valid arguments in favor of the marital privilege against permitting unfavorable testimony are arguments only against *compelling* such testimony." *Ibid.*, p. 13 (emphasis in original).
>
> "[W]e suggest that there is a general reluctance and aversion to *compelling* a man or a woman to testify against his or her life-partner." *Ibid.*, p. 24 (emphasis in original).
>
> "[W]e think that reason and experience support the view that a spouse should not be compelled to testify against her will . . ." *Ibid.*, p. 42.

Now, the government is contending that its prosecutors have the right to adjudge a marriage worthless and force one spouse to testify against another; and that our courts have the prerogative to concur in that judgment of unworthiness and to ignore the existence of a valid, legal marriage. To what limits

will this discretion extent?[12] It is patently clear that our courts should not indulge in a "Who's Got The Best Quality Marriage" judging competition.

But assuming *arguendo* that the court below was faced with a unique situation, one which required it to pass judgment not only on the merits of the case but on the Trammel's married life, as well, the opinion is devoid of any indication that the court seriously considered and weighed the variables which of necessity would form part of any such calculations. The opinion tells us that the lower court determined that,

> "It is inconceivable that the Trammels established a 'home' with any of the usual, ordinary attributes of 'family life.' There was no domestic harmony in the commonly accepted nature of a marital relationship to be preserved following commencement of the criminal activities in August of 1975." 583 F. 2d at 1170.

The court had noted earlier that it was a matter of "rank conjecture" as to the extent of Mrs. Trammel's free consent to participate in the activities which led to her husband's arrest and conviction. *Ibid.* And see Judge McKay's analysis of the non-record on this point in 583 F. 2d at 1173.

Has this Nation's judiciary arrived at the point where it will break ancient principles and rules of law, in order to convict, on the bais of "rank conjecture"?

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12. "Writers who say that it is difficult to distinguish devil's marks from natural blemishes, from a carbuncle, or from impetigo clearly show that they are not good doctors." Statement of a physician to Henry IV of France, quoted in R. Robbins, *The Encyclopedia of Witchcraft and Demonology* 136 (Crown Publications 1959).

F. The Final Reason the Opinion Below Gives for Breaking Through the Hawkins Privilege Is That the End Justifies the Means, That Is, the Defendant Is Bad and Thus Is Entitled to Fewer Rights Than Good Persons. This Is Not Sound Law, But a Dangerous Breach of Uniform Standards of Justice.

The final basis asserted by the lower court for affirming petitioner's conviction is short, but hardly sweet:

> "The overriding benefit to be served in this case has been properly served by the action of the trial court: that of bringing to the bar of justice those who have committed grievous criminal acts which most assuredly have led to the breakdown and destruction of many family units and marital relations involving illicit trafficking and use of dangerous drugs and narcotics." 583 F. 2d at 1171.

In other words, petitioner had engaged in criminal activities which were so "despicable," 583 F. 2d at 1170, that the court below felt it proper to justify the affirmation of his conviction based upon its subjective reaction to the prosecution's allegations, ignoring petitioner's entitlement to the husband-wife testimonial privilege.

Such a jurisprudential attitude is by no means new; nor is it acceptable to a system based on justice:

> "Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example . . . To declare that in the administration of justice the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face." Brandeis, J., dissenting, *Olmstead* v. *United States*, 277 U. S. 438, 485 (1928).

II.

THE CONSTITUTIONAL IMPLICATIONS OF UPHOLDING THE REASONING OF THE OPINION BELOW WOULD BE PERVASIVE AND SEVERE. WHILE THESE IMPLICATIONS ARE NOT CONSIDERED, EXPLORED OR DEVELOPED IN THE OPINION BELOW, THEY ARE REAL AND IMPORTANT. THE OPINION BELOW IMPAIRS A DEEP NATURAL RIGHT OF PRIVACY ROOTED IN THE Ist, IVth, Vth, AND IXth AMENDMENTS. THOUGH THESE RIGHTS WERE OVERLOOKED IN THIS CASE, THEY WILL RISE TO BE LITIGATED IN MANY CASES AND ASPECTS IF THE REASONING OF THE OPINION BELOW BECOMES THE LAW OF THE LAND.

A discussion of the proposed major alteration in the law of marital privilege would be lacking if it did not suggest to this Court the larger Constitutional implications. The rules of evidence are not, of course, for the most part, constitutional rules, but in specific areas they may involve or even collide with constitutional rights. In addition, privileges are not just exclusionary rules of evidence, they are also rules of substantive law created for the purpose of encouraging and protecting certain relationships society deems valuable. Reutlinger, *Policy, Privacy and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 Calif. L. Rev. 1353, 1358 (1973). *See also*, an even more forceful argument on the same tack, Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 Tul. L. Rev. 101, 111 (1956).

The validity of the marital privilege rests on two grounds. The first is the furtherance of a socially valuable institution. The second is the protection of the constitutional right to privacy. "What is at stake is no less than a right to privacy in that area of life in which privacy is perhaps most important." Reutlinger, *supra*, at 1370. This Court, in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), articulated the right to privacy

as constitutionally protected in the marital relationship. The Court recognized, as others have agreed, that privacy is central to a harmonious marriage. "A marriage without the right of complete privacy of communication would necessarily be an imperfect union." Louisell, *supra,* at 113.

The Constitutional protection of the right of privacy and the common law policy of promoting marriages necessitate that the privilege be recognized and honored. Regardless of the probative value, testimony concerning communications or conduct performed within the marital context must not be compelled or elicited without a waiver of the privilege. The search for truth in an adversary setting must not work a denial of basic constitutional rights, nor should it take automatic precedence over institutions critically important to human liberty. Those institutions have been protected at law by the operation of a system of privileges: husband-wife, attorney-client and priest-penitent most notably. The application of the Tenth Circuit's reasoning in this case would work to erode the stability of these institutions and the public faith in judicial system. A public "repelled by the visage of a judicial proceeding seemingly directed against marital harmony and unity might well turn from any cooperation with the courts." Note, *The Husband-Wife Privileges of Testimonal Non-Disclosure,* 56 Nw. U. L. Rev. 208, 231 (1961).

The marital privilege is protected in part because it is an essential shield of privacy. While some of the law of privacy is not constitutional, the rights of privacy do have their roots deep in constitutional soil, as *Griswold, supra,* illustrates. A full development of these themes is beyond the scope permitted to this brief, but these roots are set in the Ist, IVth, Vth, and perhaps IXth Amendments. *See* M. Slough, *Privacy, Freedom and Responsibility* 18 (1969). As to the constitutional complications and undesireability of laws and devices pressing privacy too closely, or invading it, see the same work at pages 14 and 15, and preface ix. The whole work is a balanced review

of the problems and authorities which space will not permit to be developed here. It only remains to be said that if the Court adopts the rule the government contends for here this area will have to be litigated in detail. The problems will not go away; they will multiply and grow.

III.

CONCLUSION. FOR ALL THE ABOVE REASONS THE HAWKINS ANTI-SPOUSE PITTING PRIVILEGE SHOULD BE RE-AFFIRMED AND HELD FULLY APPLICABLE TO THE FACTS HERE.

The six claimed reasons or distinctions advanced in the opinion below for departing from the settled rule of this Court in *Hawkins* v. *United States,* 358 U. S. 74 (1958), are severally erroneous. In addition, there are powerful reasons of policy against the radical departure from the settled law made in the opinion below, and substantial, basically unexplored Constitutional dangers in so doing. For these reasons, as detailed in this brief, your *Amicus* urges that the privilege of each spouse against the testimony of their marital partner, as unanimously upheld by this Court in *Hawkins* v. *United States, supra,* should be preserved.

Respectfully submitted,

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